(21,501.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 142.

DAVID W. LEWIS, PLAINTIFF IN ERROR,

vs.

L. FLEET LUCKETT AND MARGARET ESTELLE JONES.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 14, 1910.

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In the Court of Appeals of the District of Columbia.

No. 1942.

DAVID W. LEWIS, Appellant,
vs.
L. FLEET LUCKETT and MARGARET ESTELLE JONES.

In the Supreme Court of the District of Columbia, Holding a Probate Court.

Probate, No. 14193.

In re Estate of MARY H. LEWIS, Deceased.

Your petitioner L. Fleet Luckett respectfully represents:

1st. That he is a citizen of the United States, and a resident of the District of Columbia, and files this petition for the purposes herein set forth.

2nd. That on or about January 8th 1907, Mary Hoskins Lewis departed this life in the District of Columbia, at premises No. 3318 Sherman Avenue N. W., and that she left no heirs at law or next of kin so far as petitioner knows, with the exception of David W. Lewis, husband of the said decedent, who resides in the District of Columbia.

3rd. That the only personal property left by said decedent, consisted of certain household goods valued at Twen-y-five ($25.09) dollars, cash, One hundred and fifty-five ($155.00) dollars, one gold watch, three gold rings and some gold studs. That the said decedent died seized and possessed of the following real estate located in the District of Columbia, premises No. 3318 Sherman Avenue N. W. and the N. E. Corner of Sherman Ave. and Morton Street N. W., said real estate being valued at about Ten Thousand ($10000.00) dollars.

4th. That the only debt left by the decedent is the sum of one hundred and fifty ($150.00) dollars due for funeral expenses.

5th. That said decedent left a last will and testament dated 2d day of April A. D. 1906, which is herewith presented for probate and record, and in which your petitioner is nominated as executor.

Wherefore the premises considered your petitioner prays:

First. That a United States writ of subpœna issue against David W. Lewis, requiring him to show cause why the prayers of this petition should not be granted.

Second. That the aforesaid will and testament of Mary H. Lewis dated 2d day of April A. D. 1906 be admitted to probate and
2 record as a will of real and personal property as the last will and testament of Mary H. Lewis deceased.

Third. That letters testamentary issue on said estate to L. Fleet Luckett, executor therein, upon his giving bond for the faithful performance of his duties.

Fourth. That the Court grant such further and other relief as it may deem necessary.

L. FLEET LUCKETT.

Personally appeared before me, George W. Egleston Jr. a Notary Public in and for the district aforesaid, L. Fleet Luckett, who being first duly sworn deposes and says that he has read the foregoing petition and knows the contents of the same, that the matters and facts therein stated of his knowledge are true and those stated upon information and belief, he believes to be true.

——— ———.

Sworn and Subscribed to before me, this 18th day of January, A. D. 1907.

[NOTARIAL SEAL.] GEORGE W. EGLESTON, JR.,
Notary Public, D. C.

JANUARY 17TH, 1907.

I, Margaret Estelle Jones sole beneficiary and residuary legatee in the last will and testament of Mary H. Lewis, deceased, dated April —, A. D. 1906, do hereby waive all notice and citation and consent to the admission of said last will and testament to probate and record, and to the granting of letters testamentary under said will to L. Fleet Luckett, the executor named therein.

MARGARET ESTELLE JONES.

(Endorsement: Petition for probate of will and letters testamentary. Filed Jan. 21, 1907. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

In the Supreme Court of the District of Columbia, Holding Probate Court.

No. 14193.

In re Estate of MARY H. LEWIS, Deceased.

The petition of David W. Lewis respectfully represents:

(1) That he is informed that a certain paper writing, bearing date April 2nd, 1906, has been filed in your honorable Court as the last will and testament of Mary Hoskins Lewis, late of the District of Columbia, deceased.

(2) That the petitioner is a resident of the District of Columbia and a citizen of the United States, and as the husband of deceased files this petition.

(3) That the paper writing bearing date the 2nd day of April, 1906, and offered for probate and record as the last will and testament of the said Mary Hoskins Lewis, is not in fact the last
3 will and testament of the said Mary Hoskins Lewis; that the said paper writing was not executed by the said Mary Hoskins Lewis as and for her last will and testament, as required by law.

(4) That the execution of the said paper writing, if same ever was executed by the said Mary Hoskins Lewis, was procured by the undue influence or fraud of L. Fleet Luckett and Margaret Estelle Jones, the persons named as executor and beneficiary in said paper writing, respectively, or of some other person or persons at this time unknown to the petitioner; and that at the time said paper writing was executed, if the same was ever executed, the said Mary Hoskins Lewis was mentally and physically incompetent to execute a valid will.

(5) The petitioner herein files this caveat to the probate of said paper writing dated the 2nd day of April, 1906, as such last will and testament of the said Mary Hoskins Lewis, and he prays that the issues may be framed and tried before a jury according to law, to determine whether the said paper writing is indeed the last will and testament of the said Mary Hoskins Lewis, and whether the same was executed by her as and for her last will and testament as required by law, and, if the same was executed by her, whether or not it was executed under the undue influence or fraud of the said L. Fleet Luckett or Margaret Estelle Jones, or any other person or persons, or whether at the time of the execution of the said paper writing, if the same was ever executed by her, the said Mary Hoskins Lewis was capable of making and executing a valid will.

(6) And further, for the best interest of said estate, during the litigation incident to the trial of the issues prayed for, a proper person or persons be appointed by the Court to take charge of the estate and care for the same.

DAVID W. LEWIS.

DISTRICT OF COLUMBIA, *ss:*

David W. Lewis, being first duly sworn, deposes and says that he is the petitioner named in the foregoing petition by him subscribed, and knows the contents thereof; that the matters and things therein stated of his own knowledge are true, and those stated upon information and belief he believes to be true.

DAVID W. LEWIS.

Subscribed and sworn to before me this 4th day of January, A. D. 1907.

[NOTARIAL SEAL.] F. EDWARD MITCHELL,
Notary Public in and for the D. of C.

ROB'T E. MATTINGLY,
Attorney for Petitioner.

(Endorsement: Caveat. Filed Feb. 4, 1907. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

4 In the Supreme Court of the District of Columbia, Holding a Probate Court.

No. 14193, Adm. Doc. 36.

In re Estate of MARY HOSKINS LEWIS, Deceased.

L. Fleet Luckett, as Executor, answering the petition and caveat of David W. Lewis, states as follows:

1. It is true that a certain paper writing dated April 2, 1906, purporting to be the last will and testament of Mary Hoskins Lewis, late of the District of Columbia, deceased, and wherein L. Fleet Luckett is named as Executor thereof, has been by him, in this Court, filed and propounded for probate as and for her last will and testament.

2. He admits, for the purposes of these proceedings only, that the said David W. Lewis is a resident of the District of Columbia and a citizen of the United States and was the husband of said decedent at the time of her death although then separated from her by a decree of divorce from bed and board.

3. He denies all and sigular the statements contained in the paragraph numbered three (3) of said petition and he avers that the said paper writing is in fact the last will and testament of the said decedent and was by her executed as such, as required by law.

4. He denies all and singular the statements contained in the paragraph numbered four (4) of said petition and he avers that the said decedent was, at the time when she executed the said paper writing, mentally and physically competent to execute a valid will and that she then did voluntarily and without undue or any influence or fraud on the part of the said L. Fleet Luckett or Margaret Estelle Jones or any other person, execute said paper writing as and for her last will and testament.

5. He is a practising physician and as such professionally attended the said decedent before and until her death and has personal knowledge of the fact that she was then of sound and disposing mind memory and understanding and competent to make a valid deed or contract. He was named as Executor in said paper writing against his own inclination and desire and without solicitation on his part. He has offered and offers said paper writing for probate and record as her last will and testament because he conceives it to be his duty so to do, and he desires the issues raised by said caveat to be determined at an early date.

6. He believes and so avers that the interests of those concerned in the estate of said decedent require the appointment, by this Court, of some proper person or persons to take charge of said estate including also the real estate and rents due and to become due pending the litigation instituted by the filing of said caveat. He asks that such appointment be made and that he be authorized to employ at

the expense of said estate some member of the bar of this
5 court as his attorney to conduct said litigation on his part and that this answer be considered also as his petition for such relief.

L. FLEET LUCKETT.

JAMES A. TOOMEY &
LORENZO A. BAILEY,
Att'ys for said L. Fleet Luckett.

DISTRICT OF COLUMBIA, *ss:*

I, L. Fleet Luckett, do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts therein stated upon personal knowledge are true and those therein stated upon information and belief I believe to be true.

L. FLEET LUCKETT.

Subscribed and sworn to before me this 15th day of July, 1907.
[NOTARIAL SEAL.] FRANK B. TIPTON,
Notary Public, D. C.

(Endorsement: Answer of L. Fleet Luckett to caveat, &c. Filed Jul- 27 1907 James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

In the Supreme Court of the District of Columbia, Holding a Probate Court.

No. 14193, Adm. Doc. 36.

In re Estate of MARY HOSKINS LEWIS, Deceased.

The petitioner, Margaret Estelle Jones, states as follows:

1. This petitioner is a citizen of the United States and a resident of the District of Columbia and files this petition in her own right.

2. This petitioner knows the contents of the petition of L. Fleet Luckett herein filed January 21, 1907, and believes and so avers that the statements therein contained are true and she adopts the same as part of this petition.

3. This petitioner is informed and believes that Mary Hoskins Lewis, named in said petition of L. Fleet Luckett, was during her lifetime, the wife of Isaiah Hoskins who departed this life on or about the 27th day of May 1890; that thereafter she married David W. Lewis on or about the 30th day of September, 1896, and that the said Lewis obtained a decree of divorce from bed and board with her on the 23d day of February, 1906; that the said Mary Hoskins Lewis departed this life on or about the 8th day of January, 1907, without issue. This petitioner has made due search and inquiry to learn who are the heirs at law and next of kin of the said Mary Hoskins Lewis and of the said —— Hoskins and has been and is unable to learn who

are such heirs at law and next of kin or whether any such exist, and upon information and belief she avers that none such exist.

6 4. This petitioner is named as the beneficiary and residuary devisee and legatee of the said Mary Hoskins Lewis in the paper writing dated April 2, 1906, purporting to be her last will and testament and as such propounded herein by the said L. Fleet Luckett for probate and record.

5. This petitioner has read the answer of the said L. Fleet Luckett, which has been prepared and sworn to by him and about to be filed herein, to the caveat of the said David W. Lewis herein filed. She believes and so avers that the statements contained in said answer are true and she adopts the same as part of this petition and as her answer to said caveat.

Wherefore this petitioner prays that the said paper writing dated April 2, 1906, be admitted to probate and record as and for the last will and testament of the said Mary Hoskins Lewis, as a will of real estate and personal estate and that this petition be taken and considered as this petitioner's appearance in support of the said petition of said Luckett now pending herein for such admission to probate and record; that the said answer of L. Fleet Luckett to said caveat be taken and considered as this petitioner's answer also to said caveat. That some suitable person or persons be appointed to take charge of the real and personal estate of said decedent pending the litigation instituted by the filing of said caveat and to manage said estate under the direction of this court including also the collection of rents due and to become due, that due notice by publication or otherwise as required by law be given to the unknown heirs at law of the said Mary Hoskins Lewis and of said —— Hoskins of the pendency of these proceedings.

MARGARET ESTELLE JONES.

LORENZO A. BAILEY,
Solicitors for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

I, Margaret Estelle Jones, do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof; that the facts therein stated upon personal knowledge are true and those therein stated upon information and belief I believe to be true

MARGARET ESTELLE JONES.

Subscribed and sworn to before me this 17 day of July, A. D. 1907.

[NOTARIAL SEAL.] J. WM. REILY,
Notary Public, D. C.

(Endorsement: Petition of Margaret Estelle Jones & answer to caveat. Filed Jul- 27 1907. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

7 In the Supreme Court of the District of Columbia, Holding a Probate Court.

No. 14193, Adm. Doc. —.

In re Estate of MARY HOSKINS LEWIS, Deceased.

Upon consideration of the caveat of David W. Lewis to the probate and record of the paper writing dated April 2, 1906, propounded by L. Fleet Luckett, as Executor, as and for the last will and testament of Mary Hoskins Lewis, deceased, and of the answer of the said L. Fleet Luckett to said caveat and of the petition of Margaret Estelle Jones which is considered also as her answer to said caveat, it is by the Court, this 31st day of July, A. D. 1907, Ordered that the following issues be tried by jury in this court, that is to say:

1. Was the said paper writing duly executed in due form of law by the said Mary Hoskins Lewis as and for her last will and testament?

2. Was the said paper writing procured from the said Mary Hoskins Lewis by undue influence?

3. Was the said paper writing procured from the said Mary Hoskins Lewis by fraud?

4. Was the said Mary Hoskins Lewis, at the time of the execution of the said paper writing, of sound and disposing mind and capable of executing a valid deed or contract?

And it is further ordered that the 4th day of November A. D. 1907, be and is hereby fixed as the date of the trial of said issues.

THOS. H. ANDERSON, *Justice.*

(Endorsement: Order framing issues & setting date for trial. Filed July- 31, 1907 James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

MONDAY, *February* 3, 1908.

Mr. Justice Barnard presiding.

No. 14193, Adm. Doc. 36.

In re Estate of MARY H. LEWIS, Deceased.

MARGARET ESTELLE JONES and L. FLEET LUCKETT (Caveatees), Plaintiffs,

vs.

DAVID W. LEWIS (Caveator), Defendant.

Now come here again the parties aforesaid, in manner aforesaid, and the same jury that was respited on Thursday last; whereupon, the jury, after the case is given them in charge, upon their oath say:

In answer to the first issue:

Was the said paper writing duly executed in due form of law by

the said Mary Hoskins Lewis as and for her last will and testament?

8 They answer "Yes."

In answer to the second issue:

Was the said paper writing procured from the said Mary Hoskins Lewis by undue influence?

They answer "No."

In answer to the third issue:

Was the said paper writing procured from the said Mary Hoskins Lewis by fraud?

They answer "No."

In answer to the fourth issue:

Was the said Mary Hoskins Lewis at the time of the execution of the said paper writing of sound and disposing mind and capable of executing a valid deed or contract?

They answer "Yes."

Docket Entries.

1908, Feb. 3.—Verdict sustaining will.

Teste:

J. R. YOUNG, *Clerk*,
By E. J. McKEE, *Ass't Clerk*.

(Endorsement: 5th Minute Entry. Verdict sustaining will. Filed Feb. 3, 1908. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

Form No. 24.

Supreme Court of the District of Columbia, Holding Probate Court.

No. 14193, Administration Docket 36.

Estate of MARY HOSKINS LEWIS, Deceased.

Application having been made herein for probate of the last will and testament of said deceased, and for letters testamentary on said estate, by L. Fleet Luckett it is ordered this 24th day of February, A. D. 1908, that the unknown next of kin and the unknown heirs at law of the said Mary Hoskins Lewis, deceased and of Isaiah W. Hoskins, deceased and all others concerned, appear in said Court on Friday, the third day of April, A. D. 1908, at 10 o'clock A. M., to show cause why such application should not be granted. Let notice hereof be published in the "Washington Law Reporter" and the Washington Post once in each of three successive weeks before the return day herein mentioned—the first publication to be not less than thirty days before said return day.

ASHLEY M. GOULD, *Justice*.

Attest:

——— ———,
Register of Wills for the District of Columbia, Clerk of the Probate Court.

JAMES A. TOOMEY,
LORENZO A. BAILEY,
Attorneys.

9 NOTE.—A copy of above publication must be mailed to the last known post office address of each non-resident party therein named, and proof must be made of such mailing at least twenty days before decree, as provided in Sec. 108 of the Code of Law for the District of Columbia.

(Endorsement: Order of Publication, Probate of Will, dated Feb. 24, 1908, Return day Apr. 3, 1908. Papers W. L. R. and Post. Filed Feb. 24, 1908. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

In the Supreme Court, District of Columbia, this 10th Day of March, 1908.

No. 14193, Adm.

Estate MARY H. LEWIS.

Affidavit.

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before me, a Notary Public in and for the said District, Arthur D. Marks, well known to me to be Business Manager of The Washington Post, a daily newspaper printed and published in the City of Washington and the District aforesaid, and made oath in due form of law that the annexed notice was published in said daily newspaper at the times mentioned in the Certificate opposite hereto.

Witness my hand and official seal, this 10th day of March, 1908.

[NOTARIAL SEAL.] CHARLES S. FLETCHER,
Notary Public, D. C.

Supreme Court of the District of Columbia, Holding Probate Court.

No. 14193, Administration Docket —.

Estate of MARY HOSKINS LEWIS, Deceased.

Application having been made herein for probate of the last will and testament of said deceased, and for letters testamentary on said estate, by L. Fleet Luckett, it is ordered this 24th day of February, A. D. 1908, that the unknown next of kin and the unknown heirs at law of the said Mary Hoskins Lewis, deceased, and of Isaiah W. Hoskins, deceased, and all others concerned, appear in said Court on Friday, the 3rd day of April, A. D. 1908, at 10 o'clock, A. M., to show cause why such application should not be granted. Let notice hereof be published in the Washington Law Reporter
10 and The Washington Post once in each of three successive weeks before the return day herein mentioned, the first publication to be not less than thirty days before said return day.

ASHLEY M. GOULD, *Justice.*

[SEAL.] JAMES TANNER,
Register of Wills for the District of Columbia, Clerk of the Probate Court.

JAMES A. TOOMEY,
LORENZO A. BAILEY,
Attorneys.

2—142

I Hereby Certify, that the foregoing Legal Notice was printed and published in The Washington Post, a daily newspaper, upon the following dates:

Feb'y 25, March 3", 10", 1908.

ARTHUR D. MARKS,
Business Manager.

Cost of proof of publication not paid unless annexed receipt is signed and stamped by cashier of The Washington Post Company.

WASHINGTON, D. C., *March* 10, 1908.

Mr. Jas. A. Toomey & L. A. Bailey, Att'ys, to The Washington Post Company, Dr.

For publishing the annexed Legal Notice in The Washington Post..... $7.20

Received payment for the Company —— —, 190–.

—— ——.

(Endorsement: Proof of Publication in The Washington Post. Cost of Publication $7.20 Filed Apr. 9, 1908 James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

In the Supreme Court, District of Columbia, This 20 Day of March, 1908.

Probate Court.

No. 14193, Docket No. —.

Estate of MARY HOSKINS LEWIS.

Affidavit.

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before me, a Notary Public in and for the said District, M. W. Moore, well known to me to be the Manager of "The Washington Law Reporter," a weekly newspaper printed and published in the City of Washington and District aforesaid.
11 and made oath in due form of law that the annexed notice was published in said weekly newspaper at the times mentioned in the Certificate opposite hereto.

Witness my hand and official seal this 20 day of March 1908.

[NOTARIAL SEAL.] ALFRED D. SMITH,
Notary Public, D. C.

Copy of Notice.

James A. Toomey and Lorenzo A. Bailey, Attorneys.

Supreme Court of the District of Columbia, Holding Probate Court.

No. 14193, Administration Docket —.

Estate of MARY HOSKINS LEWIS, Deceased.

Application having been made herein for probate of the last will and testament of said deceased, and for letters testamentary on said estate by L. Fleet Luckett, it is ordered this 24th day of February, A. D. 1908 that the unknown next of kin and the unknown heirs at law of the said Mary Hoskins Lewis, deceased, and of Isaiah W. Hoskins, deceased, and all others concerned, appear in said court on Friday, the 3d day of April, A. D. 1908, at 10 o'clock A. M., to show cause why such application should not be granted. Let notice hereof be published in The Washington Law Reporter and The Washington Post once in each of three successive weeks before the return day herein mentioned, the first publication to be not less than thirty days before said return day.

[SEAL.] ASHLEY M. GOULD, *Justice.*

Attest:

JAMES TANNER,
Register of Wills for the District of Columbia, Clerk of the Probate Court.

9–3t

I Hereby Certify that the foregoing Legal Notice was printed and published in the regular issues of "The Washington Law Reporter," a weekly newspaper, bearing date Feb. 28-March 6-13-1908.

M. W. MOORE,
Gen. Manager of The Law Reporter Co. of Washington City.

12 No. 14193, Doc. —.

Estate of LEWIS.

WASHINGTON, D. C., *March* 20, 1908.

M. J. A. Toomey & L. A. Bailey to The Law Reporter Printing Company, Dr.

OFFICE OF PUBLICATION, 518 FIFTH STREET, N. W.

For Publishing the annexed Legal Notice in "The Washington Law Reporter," $7.92

Received payment for the Company —— —, 190–.

——— ———,
General Manager.

Per —— ——.

Endorsement: Proof of Publication Cost of Publication, $7.92 Filed Apr. 10 1908 James Tanner, Register of Wills, D. C., Clerk of Probate Court.

In the Supreme Court of the District of Columbia, Holding Probate Court.

Probate, No. 14193.

In re the Estate of MARY HOSKINS LEWIS, Deceased.

Now comes David W. Lewis, husband of decedent, Mary Hoskins Lewis, by and through his attorneys, Gittings & Chamberlin and Robert E. Mattingly, Esq., and moves the court to vacate and set aside the order passed in this cause on the 31st day of July, 1907, framing issues to be tried by a jury, and to vacate and set aside any and all subsequent proceedings had pursuant to said order, including the verdict of the jury, and as ground therefore, states: That it is apparent on the face of the record in this cause that the court was without jurisdiction at the time of the passage of the order of the 31st day of July, 1907, to frame issues and fix the date of trial because the conditions precedent of Sections 130 to 140, inclusive, of the Code of Laws of the District of Columbia, had not been complied with, in this; viz:

There was no publication against the unknown heirs of decedent prior to framing of issues; and there was no publication of issues and date set for trial prior to trial as required by said sections of the Code, notwithstanding;

(*a*) The petition of L. Fleet Luckett filed in this cause January 21, 1907, for probate of the alleged will of deceased, recites

"She left no heirs at law or next of kin so far as the petitioner knows with the exception of David W. Lewis, husband of the decedent."

13 and (*b*) That the petition and answer of Margaret Estelle Jones filed in this cause July 27, 1907, prays

"That due notice by publication or otherwise as required by law be given to the unknown heirs at law of the said Mary Hoskins Lewis and of the said —— Hoskins of the pendency of these proceedings."

GITTINGS & CHAMBERLIN,
ROB'T E. MATTINGLY,
Attorneys for Caveator.

Messrs. Lorenzo A. Bailey and James A. Toomey, Attorneys for Caveatees:

Please take notice that we shall call the above motion to the attention of Mr. Justice Gould holding the Probate court on Friday, the 20th day of March, 1908, or as soon thereafter as counsel may be heard.

GITTINGS & CHAMBERLIN,
ROB'T E. MATTINGLY,
Attorneys for Caveator.

(Endorsement: Motion to vacate proceedings. Filed Mar. 17 1908. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

In the Supreme Court of the District of Columbia, Holding a Probate Court.

No. 14193, Adm.

In re Estate of MARY HOSKINS LEWIS, Deceased.

Upon consideration of the motion of Davis W. Lewis, herein filed on the 17th day of March, 1908, to vacate the order of July 31, 1907, framing issues to be tried by jury and to vacate the verdict and any — all proceedings subsequent and pursuant to said order, and argument † upon |agreement|* of counsel, it is by the Court this 8th day of April, 1908, Adjudged and Ordered that the said motion be and is hereby denied.

ASHLEY M. GOULD, *Justice.*

To the overruling of said motions the said David W. Lewis then and there duly excepted which exceptions is hereby noted and granted.

ASHLEY M. GOULD, *Justice.*

(Endorsement: Order denying motion to vacate proceedings. Filed Apr. 8 1908. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

14 In the Supreme Court of the District of Columbia, Holding Probate Court.

No. 14193, Adm. Doc. —.

In re Estate of MARY HOSKINS LEWIS, Deceased.

Upon consideration of the petitions of L. Fleet Luckett and Margaret Estelle Jones and the answer and caveat of David W. Lewis and the verdict of the jury impaneled to try the issues framed herein upon said caveat and the proof by the attesting witnesses of the due execution of the paper writing dated April 2, 1906, by Mary Hoskins Lewis, since deceased, as and for her last will and testament, being the same paper writing mentioned in said petitions, caveat and verdict, and upon consideration of all and singular the proceedings herein had, it is by the court, this 15th day of April, A. D. 1908, Adjudged that the said paper writing dated April 2, 1906, was duly

[†On margin.]
[*Erased in copy.]

executed by the said Mary Hoskins Lewis as and for her last will and testament, and that the execution thereof by her was not procured by undue influence or fraud and that at the time of the execution thereof the said Mary Hoskins Lewis was mentally and physically competent to execute the same as and for her last will and testament.

And upon consideration of the premises it is by the court further Adjudged, and Ordered and Decreed that the said paper writing dated April 2, 1906, be and the same is hereby admitted to probate and record as the last will and testament of the said Mary Hoskins Lewis, deceased, as to personal and real estate and that letters testamentary on said estate issue to the said L. Fleet Luckett who is named in said will as the executor thereof, upon his first giving bond, to be approved by the court, in the sum of Three hundred dollars ($300.00) and conditioned as required by law for the faithful performance of his trust, and that the said L. Fleet Luckett and Margaret Estelle Jones, caveatees, recover of the said David W. Lewis, caveator, the taxable costs of said trial by jury and all taxable costs incurred by reason of the filing of said caveat, and to be taxed by the clerk of this court, and have execution therefor as at law.

ASHLEY M. GOULD, *Justice.*

And from the above decree, the said David W. Lewis prays an appeal to the Court of Appeals which is hereby granted, and the bond for costs on said appeal is hereby fixed at One hundred dollars.

ASHLEY M. GOULD, *Justice.*

(Endorsement: Decree admitting will to probate, etc. Filed Apr. 15, 1908. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

15 Form No. —.

Supreme Court of the District of Columbia, Holding a Probate Court.

Probate, No. 14193, Administration.

DAVID W. LEWIS
vs.
Estate of MARY H. LEWIS, Deceased.

Know all Men by these Presents, That we David W. Lewis, of Washington, D. C. as principal, and Jacob P. Frech, of Washington, D. C. as surety are held and firmly bound unto the above-named Estate of Mary H. Lewis, deceased in the full sum of One Hundred dollars, to be paid to the said Estate of Mary H. Lewis, deceased, executors, administrators, successors or assigns; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals, and dated this fifth day of March, in the year of our Lord one thousand nine hundred and eight.

Whereas the above-named David W. Lewis has prosecuted an appeal to the Court of Appeals of the District of Columbia, to reverse the Judgment rendered in the above suit by the said Supreme Court of the District of Columbia.

Now, Therefore, the condition of this obligation is such, That if the above-named David W. Lewis shall prosecute his said appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

DAVID W. LEWIS. [SEAL.]
JACOB P. FRECH. [SEAL.]

Sealed and delivered in presence of—

——.
——.

This bond is satisfactory to be re-approved,
April 16/08.

JAS. A. TOOMEY &
L. A. BAILEY, *Att'ys.*

Approved the 16th day of April, 1908.

JOB BARNARD,
Justice S. C. D. C.

(Endorsement: Bond for Appeal. Approved April 16, 1908. Filed April 16, 1908. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

16 In the Supreme Court of the District of Columbia, Holding Special Term of Probate Court.

Probate, No. 14193.

In re Estate of MARY HOSKINS LEWIS, Deceased.

On consideration of the motion on behalf of caveator that his time in which to file the transcript of record in the Court of Appeals be extended for thirty days, it is hereby, by the Court this 22nd day of May, A. D., 1908, ordered that caveator's time in which to file the transcript of record in the Court of Appeals be, and the same hereby is, extended until the 22nd day of June A. D. 1908.

ASHLEY M. GOULD, *Justice.*

(Endorsement: Order for extension of time to file transcript of record. Filed May 22, 1908. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

In the Supreme Court of the District of Columbia, Holding Special Term of Probate Court.

Probate, No. 14193.

In re Estate of MARY HOSKINS LEWIS, Deceased.

On consideration of the motion on behalf of caveator that his time in which to file the transcript of record in the Court of Appeals be extended for thirty days, it is hereby, by the Court this 18th day of June, A. D. 1908, ordered that caveator's time in which to file the transcript of record in the court of Appeals be, and the same hereby is extended until the 18th day of July A. D. 1908.

THOS. H. ANDERSON, *Justice.*

(Endorsement: Order extending time of caveator in which to file transcript of record in the court of Appeals. Filed Jun- 18 1908. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

In the Supreme Court of the District of Columbia.

Probate, No. 14193.

In re the Estate of MARY HOSKINS LEWIS, Deceased.

On consideration of the motion on behalf of caveator that his time in which to file the transcript of record in the court of appeals be extended for thirty days, it is hereby, by the court this 14th day of July, 1908, ordered that caveator's time in which to file the transcript of record in the court of Appeals, be, and the same hereby is extended until the 18th day of August, A. D. 1908.

WRIGHT, *Justice.*

17 (Endorsement: Order for extension of time in which to file transcript of record in the court of Appeals. Filed Jul- 14 1908. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

In the Supreme Court of the District of Columbia.

Probate, No. 14193.

In re the Estate of MARY HOSKINS LEWIS, Deceased.

James Tanner, Esquire, Register of Wills.

SIR: Please make up the record to the court of Appeals in the above entitled cause, including therein the following pleadings and decrees, and none other:

(1) Petition of L. Fleet Luckett for probate of the will, and citation thereon.

(2) Caveat of David W. Lewis.
(3) Answer of L. Fleet Luckett.
(4) Petition of Margaret E. Jones for probate and answer to caveat.
(5) Issues.
(6) Verdict of Jury.
(7) Order for and proof of publication for unknown heirs, devisees, etc.
(8) Motion of David W. Lewis to vacate the issues and all proceedings subsequent thereto.
(9) Order denying motion.
(10) Order admitting will to probate and appeal therefrom.
(11) Appeal bond.
(12) Orders extending time to file transcript.

JOHN C. GITTINGS,
ROBT. E. MATTINGLY,
Attorneys for Caveator.

(Endorsement: Order to clerk to make up record to Court of Appeals. Filed Aug. 4, 1908. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

Form No. 94.

Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *ss:*

I, Wm. C. Taylor, Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court, Do Hereby Certify the foregoing pages, numbered from 1 to 29, inclusive, to be true copies of the originals of certain papers on file in the office of the Register of Wills, Clerk of the Probate Court, in case No. 14,193 estate of Mary Hoskins Lewis, deceased, wherein David W. Lewis is appel-
18 lant, and L. Fleet Luckett & Margaret Estelle Jones are appellees, the same constituting a full, true, and correct transcript of record of proceedings had in said cause according to the Order of counsel filed therein and made a part hereof.

I Further Certify, That the bond for appeal, in the penalty of One Hundred Dollars *dollars*, was duly filed by said appellant, and approved by said Court on the 16th day of April, A. D. 1908.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said Probate Court, this 14th day of August, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

W. C. TAYLOR,
Deputy Register of Wills for the District of Columbia,
Clerk of the Probate Court.

Endorsed on cover: District of Columbia supreme court. No. 1942. David W. Lewis, appellant, vs. L. Fleet Luckett and Margaret Estelle Jones. Court of Appeals, District of Columbia. Filed Aug. 15, 1908. Henry W. Hodges, clerk.

19 In the Court of Appeals, District of Columbia, October Term, 1908.

No. 1942.

DAVID W. LEWIS, Appellant,
vs.
L. FLEET LUCKETT et al., Appellees.

Stipulation of Counsel.

It being apparent that the word "agreement," appearing in the 11th line from the bottom on page 13 of the printed record in the order signed by the court and filed on April 8, 1908, should be "argument," and that the error is a typographical one, it is this 28th day of September, 1908, stipulated and agreed by and between counsel that the word "argument" is correct and that the printed record be read and considered as though the word "argument" instead of "agreement" appeared therein at said place; no other grounds of objection to the record for errors, defects or insufficiencies therein, either formal or substantial, being hereby waived or in any way affected.

JOHN C. GITTINGS,
Of Counsel for Appellant.
LORENZO A. BAILEY,
JAMES A. TOOMEY,
Of Counsel for Appellees.

(Endorsed:) No. 1942. David W. Lewis, Appellant, vs. L. Fleet Luckett, et al., Appellees. Stipulation of Counsel. Court of Appeals, District of Columbia. Filed Oct. 1, 1908. Henry W. Hodges, Clerk.

20 In the Court of Appeals of the District of Columbia.

No. 1942.

DAVID W. LEWIS, Appellant,
vs.
L. FLEET LUCKETT, and MARGARET ESTELLE JONES.

Now come here the appellees by their attorneys and move the Court to dismiss this appeal upon the ground that the same has not been perfected as required by the rules of this Court and upon other grounds appearing in the record herein filed.

LORENZO A. BAILEY,
J. A. TOOMEY,
Attorneys for Appellees.

(Endorsed:) No. 1942. David W. Lewis, App'l't, v. L. Fleet Luckett, et al. Motion to dismiss appeal. Court of Appeals, District of Columbia. Filed Oct. 6, 1908. Henry W. Hodges, Clerk.

21 TUESDAY, *October 6th, A. D.* 1908.

No. 1942.

DAVID W. LEWIS, Appellant,
vs.
L. FLEET LUCKETT, and MARGARET ESTELLE JONES.

The motion to dismiss in the above entitled cause was submitted to the consideration of the court by Mr. L. A. Bailey, of counsel for the appellees, in support of motion.

FRIDAY, *October 16th, A. D.* 1908.

No. 1942.

DAVID W. LEWIS, Appellant,
vs.
L. FLEET LUCKETT, and MARGARET ESTELLE JONES.

On consideration of the motion to dismiss in the above entitled cause, It is by the Court this day ordered that said motion be and the same is hereby postponed until the hearing of the case on its merits.

22 WEDNESDAY, *November 4th, A. D.* 1908.

No. 1942.

DAVID W. LEWIS, Appellant,
vs.
L. FLEET LUCKETT, and MARGARET ESTELLE JONES.

The argument in the above entitled cause was commenced by Mr. J. C. Gittings, attorney for the appellant, and was continued by Messrs. J. A. Toomey and L. A. Bailey, attorneys for the appellees, and was concluded by Mr. J. C. Gittings, attorney for the appellant.

23 No. 1942.

DAVID W. LEWIS, Appellant,
vs.
L. FLEET LUCKETT, and MARGARET ESTELLE JONES.

Opinion.

Mr. Justice ROBB delivered the opinion of the Court:

In this appeal a reversal is sought of an order of the Supreme Court of the District sitting as a Probate Court, admitting to probate and record as the last will and testament of Mary Hoskins Lewis, deceased, a paper writing dated April 2, 1906, and granting letters testamentary to L. Fleet Luckett, the executor named in said will.

On January 21, 1907, appellee Luckett filed his petition below reciting *inter alia* the death of testatrix and that she left no heirs at law or next of kin, so far as he knew, with the exception of appellant, David W. Lewis, husband of said testatrix, and praying that said will be admitted to probate and record, etc.

Thereafter, on February 4, 1907, appellant filed a caveat in opposition averring fraud and undue influence and mental and physical incapacity. Appellee Luckett filed an answer denying the averments of the caveat, and Miss Jones filed an answer in the form of a petition in which she adopted the answer of said Luckett, and further stated that testatrix was at one time the wife of Isiah Hoskins, deceased, that she subsequently married appellant, who obtained a decree of divorce from bed and board with her, and that petitioner had made due search and inquiry to ascertain the identity of the heirs at law and next of kin of said testatrix and said Hoskins, and, having learned of none, upon information and belief averred that none existed. After asking that said will be admitted to probate she prayed that "due notice by publication or otherwise as required by law be given to the unknown heirs at law" of said testatrix, etc.

These answers were filed July 27, 1907, and on July 31, 1907, issues were framed for trial by jury. Thereafter, on February 3, 1908, the jury, after trial in which appellant as caveator participated, returned a verdict sustaining the will.

On February 24, 1908, the court signed an order requiring notice by publication to be given to the unknown next of kin and the unknown heirs at law of testatrix and said Hoskins.

On March 17, 1908, appellant moved to vacate said order of July 31, 1907, framing jury issues, and also to vacate all subsequent proceedings, including the verdict of the jury, on the ground that it was apparent on the face of the record that the court at the time of the framing of said jury issues, was without jurisdiction, because there had then been no publication against unknown heirs. The motion was denied and this appeal followed.

Appellees move a dismissal of this appeal on the ground that the appeal bond filed by appellant is dated prior to the date of the final decree in the case, and is, therefore, as appellee contends, inapplicable thereto.

The record discloses that, subsequent to the final decree of the court herein, appellee *reapproved* the bond theretofore filed, and that the court thereupon accepted and approved said bond. Having expressly waived the point appellee is not at liberty to press it here. We, therefore, overrule the motion without intimating any opinion on the question sought to be raised.

The sole question in this case is whether or not the proceedings under the caveat, in which appellant participated as caveator and which resulted in a verdict sustaining the will, were void and of no effect because publication against unknown heirs was not made until after the verdict of the jury.

Section 130 of the Code requires the court, upon the filing of a petition for probate of a will, to issue a citation "to all persons who would be entitled to, or interested in, the estate of the testator in

case such will had not been executed," to appear in said court on a day named "to show cause why the will should not be probated." If it appears from the return to said petition that notice has been served upon all said persons at least five days before the return day, the court is required to proceed, if no caveat has been filed, to take the proofs of the execution of the will. If any of the parties interested as aforesaid are returned "not to be found," the court is required to cause not less than thirty days' notice of the application for such probate to be published for three successive weeks in some newspaper of general circulation in the District, and "shall cause a copy of such publication to be mailed to the last known post office address of each of the parties so returned 'not to be found.'" It is apparent that this part of section 130 deals with persons known to be interested in the estate of the testator in the event the will is not sustained, and not to unknown heirs and next of kin. All doubt as to the correctness of this interpretation is removed by reading the amendment to the section, which provides that "in all cases where it is made to appear to the satisfaction of the court that all or any of the next of kin or heirs at law of the deceased are unknown, such unknown next of kin or heirs at law may be proceeded against and described in the publication of notice hereinbefore provided for as 'the unknown next of kin' or 'the unknown heirs at law,' as the case may be, of the deceased, and by such publication of such notice under such designation such unknown next of kin and heirs at law shall be as effectually bound and concluded as if known and their names were specifically set forth in said order of publication." The amendment further provides that any will theretofore admitted to probate upon publication of notice to unknown heirs at law or next of kin may, upon petition of any person interested, be admitted to further probate under the proceedings next above referred to, and that the court in such case may make a decree "confirming such previous probate," and such decree so made shall be as effectual as if the said heirs at law or next of kin were named in the order of publication.

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Section 140 of the Code requires at least ten days' notice to be given the heirs at law or next of kin of the decedent and all persons claiming under the will of the time and place of the trial of the issues framed under a caveat, and that each shall be served with a copy of said issues. The section further provides that "if, as to any party in interest, the notification shall be returned 'Not to be found,' the court shall assign a new day for such trial, and shall order publication," etc.

The petition for the probate of the will in this case states that the testatrix "left no heirs at law or next of kin, with the exception of David W. Lewis, husband of said decedent." Service was duly made upon the said Lewis, and he appeared and filed a caveat, upon which issues were framed and a trial had. Obviously, therefore, the return to the citation could not have stated that any parties known to be interested were "not to be found." It is also apparent that all persons known to be interested were duly served with notice as required by section 140. But for the subsequent publi-

cation against unknown heirs and next of kin no question could have been raised as to the regularity of the proceedings, because the petition was in due form, in the proper court, and proper notice was given the known heirs. The publication as to the unknown heirs is discretionary with the trial court and a mere precautionary measure, and does not, in our view, affect the jurisdiction theretofore obtained.

The Supreme Court of the District, holding a Probate Court, has general jurisdiction of all wills presented for probate in this District. In re Dalgren, 30 App. D. C., 588. There can be no doubt, therefore, that the court had general jurisdiction of the subject-matter of this controversy. In re Dugan v. Northcutt (7 App. D. C., 351), it was held that, even assuming that jurisdiction depends upon notice to the next of kin, jurisdiction attaches when any of the persons intended to be notified voluntarily come in and become actors in the proceeding.

In the present case notice was given all persons known to be interested, and they appeared and submitted to the jurisdiction they now challenge. The court having had jurisdiction of both the subject-matter and the parties, the failure to publish as to unknown heirs and next of kin until after the trial did not as against appellant affect the conclusiveness of the issues determined by the trial.

We conclude, therefore, that as against appellant the verdict of the jury was final and conclusive, and that the decision below must be affirmed, with costs. Affirmed.

25 MONDAY, *November 16th, A. D.* 1908

No. 1942, October Term, 1908.

DAVID W. LEWIS, Appellant,
vs.
L. FLEET LUCKETT and MARGARET ESTELLE JONES.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE ROBB.

November 16, 1908.

TUESDAY, *December 1st, A. D.* 1908.

No. 1942.

DAVID W. LEWIS, Appellant,
vs.
L. FLEET LUCKETT and MARGARET ESTELLE JONES.

On motion of Mr. J. M. Chamberlin, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

26 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between David W. Lewis, Appellant, and L. Fleet Luckett and Margaret Estelle Jones, Appellees, a manifest error hath happened, to the great damage of the said Appellant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 1st day of December, in the year of our Lord one thousand nine hundred and eight.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———,

———.

27 (*Bond on Writ of Error.*)

Know all men by these presents, That we, David W. Lewis, as principal, and Jacob P. Frech, as surety, are held and firmly bound unto L. Fleet Luckett, executor, and Mary Estelle Jones in the full and just sum of Three hundred dollars to be paid to the said L.

Fleet Luckett, executor, and Mary Estelle Jones, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of January, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between David W. Lewis vs. L. Fleet Luckett, executor, and Mary Estelle Jones a judgment was rendered against the said David W. Lewis and the said David W. Lewis having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said L. Fleet Luckett, executor, and Mary Estelle Jones citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said David W. Lewis shall prosecute said writ of error to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JACOB P. FRECH. [SEAL.]
DAVID W. LEWIS. [SEAL.]

Sealed and delivered in the presence of—

——— ———.
——— ———.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

JAN. 28, 1909.

The within named surety, Jacob P. Frech, is satisfactory to the defendants in error.

LORENZO A. BAILEY,
Att'y for Def'ts in Error.

[Endorsed:] No. 1942. David W. Lewis, appellant, vs. L. Fleet Luckett et al. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jan. 29, 1909. Henry W. Hodges, Clerk.

28 UNITED STATES OF AMERICA, *ss:*

To L. Fleet Luckett and Margaret Estelle Jones, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein David W. Lewis is plaintiff in error, and you are defendants in

error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 29th day of January, in the year of our Lord one thousand nine hundred and nine.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 29th day of January, A. D. 1909.

JAMES A. TOOMEY,
L. A. BAILEY,
Att'ys for Def'ts in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jan. 29, 1909. Henry W. Hodges, Clerk.

29 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 28 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of David W. Lewis, Appellant, vs. L. Fleet Luckett and Margaret Estelle Jones No. 1942, January Term, 1909, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 29th day of January, A. D. 1909.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,501. District of Columbia Court of Appeals. Term No. 142. David W. Lewis, plaintiff in error, vs. L. Fleet Luckett and Margaret Estelle Jones. Filed January 30th, 1909. File No. 21,501.

Supreme Court of the United States

OCTOBER TERM, 1910

No. 142

DAVID W. LEWIS, PLAINTIFF IN ERROR,

vs.

L. FLEET LUCKETT AND MARGARET ESTELLE JONES.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR

This is a writ of error to the Court of Appeals of the District of Columbia to review the judgment of that court affirming an order of the Supreme Court of the District of Columbia holding a probate court, admitting to probate and record as the last will and testament of Mary Hoskins Lewis, a certain paper writing dated April 2, 1906. The defendant in error, L. Fleet Luckett, is the executor named in the paper writing and the appellee, Margaret Estelle Jones, is the sole beneficiary and residuary legatee thereunder, and the plaintiff in error, David W. Lewis, is the husband of said decedent.

STATEMENT OF THE CASE.

The defendant in error, L. Fleet Luckett, on January 21, 1907, filed a petition stating that Mary Hoskins Lewis died on the 8th day of January, 1907, leaving a will dated April 2d, 1906 (R., 1), requesting that said paper writing be admitted to probate and record as her last will and testament, and praying that letters testamentary issue to him as executor named therein. In paragraph 2 of said petition, he recited that the deceased left *no heirs at law, or next of kin so far as he knows*, with the exception of David W. Lewis, husband of the decedent, the plaintiff in error herein, and prayed that he be required to show cause why the prayers of the petitioner should not be granted.

Thereafter, on February 4, 1907, plaintiff in error caveated the alleged will, stating that said paper writing was procured by undue influence and fraud of the defendants in error, and that the deceased was mentally and physically incompetent to make a valid will, and prayed that said paper writing be not admitted to probate and record, and that issues be framed for trial by jury to determine whether it was her last will and testament (R., 2).

On July 27, 1907 (R., 4), the defendant in error, Luckett, filed his answer denying all of the allegations of the caveat. On the same day the defendant in error, Jones, filed what she termed a petition (R., 5), in which she adopted the answer made by Luckett, and in paragraph 3 recited, that the decedent was formerly the wife of one Isaiah Hoskins, who died about six years before marrying the appellant; and in said third paragraph further alleged that, "*petitioner has made due search and inquiry to learn who are the heirs at law and next of kin of the said Mary Hoskins Lewis and of the said*

—— Hoskins and has been and is unable to learn who are the heirs at law and next of kin, or whether any such exist, and upon information and belief she avers that none exist;" and prayed that, *"due notice by publication or otherwise, as required by law be given to the unknown heirs at law of the said Mary Hoskins Lewis and of said —— Hoskins of the pendency of these proceedings."* NO PUBLICATION, HOWEVER, WAS EVER MADE. On July 31, 1907, an order was passed framing certain issues to be tried by a jury and fixing November 4, 1907, as the date of trial. The issues were those usually framed in such cases, that is: whether the paper writing was duly executed in due form of law; whether it had been procured by undue influence or fraud, and whether the deceased was of sound and disposing mind at the time (R., 7).

On February 3, 1908, the jury returned a verdict sustaining the will (R., 8).

On February 24, 1908, several weeks after the trial, an order was passed (R., 8) citing the unknown next of kin and unkown heirs at law of the said Mary Hoskins Lewis, deceased, and of Isaiah W. Hoskins, deceased, and all others concerned, to appear and show cause on April 3, 1908, why the application of the appellee, Luckett, for probate of the will of the deceased, should not be granted; which notice was thereafter published in the Washington Post and in the Washington Law Reporter (R., 9).

On March 17, 1908, appellant moved to vacate the aforesaid order of July 31, 1908, framing issues to be tried by jury, and to vacate all subsequent proceedings pursuant thereto, including the verdict of the jury, on the ground that it is apparent on the face of the record that the court was without jurisdiction at that time to frame issues and fix the date of trial, because certain

conditions precedent as required by law, to wit: sections 130 to 140 inclusive, of the Code of the District of Columbia, had not been complied with, in that there had been no publication against the unknown heirs prior to framing the issues, and that there was no publication of issues and of the date set for trial as required by said sections before said issues were tried (R., 12).

The court denied said motion (R., 13), to which ruling the appellant excepted (R., 13). Finally, on April 15, 1908, upon consideration of the pleadings and the verdict of the jury the court signed an order admitting said paper writing to probate and record as the last will and testament of the deceased, as to personalty and real estate, and granting letters testamentary to the appellee, Luckett. From this order appellant appealed (R., 14).

ASSIGNMENT OF ERROR.

THE COURT BELOW ERRED IN AFFIRMING THE RULING OF THE TRIAL COURT IN REFUSING TO GRANT APPELLANT'S MOTION (R., 12-13) TO VACATE AND SET ASIDE THE ORDER OF THE 31ST OF JULY, 1907, FRAMING ISSUES TO BE TRIED BY JURY AND ALL PROCEEDINGS SUBSEQUENT THERETO, INCLUDING THE VERDICT OF THE JURY, FOR THE REASON THAT—

The probate court of the District of Columbia is a court of limited and statutory jurisdiction only, and sections 130 and 140 of the Code of the District of Columbia must be complied with before it has jurisdiction to inquire into the status of a deceased person at the time of the execution of the alleged will.

ARGUMENT.

The one question in this case is whether sections 130 and 140 are not prerequisite requirements to the juris-

diction of the probate court to determine the validity of any will offered for probate.

Section 130 is as follows:

> "SECTION 130. *Citation.*—Upon the filing of a petition for probate of a will a citation shall be issued to all persons who would be entitled to or interested in the estate of the testator in case such will had not been executed to appear in said court on a day named, not earlier than ten days, exclusive of Sundays, after the filing of said petition, and show cause why the prayer of the petition should not be granted. If said citation shall appear from the return thereof to have been served upon all said persons at least five days before the day named as aforesaid, the said court shall proceed, if no caveat be filed, to take the proofs of the execution of said will. But if any of the parties interested as aforesaid, as heirs, next of kin, or otherwise, shall be returned 'Not to be found,' the said court shall cause *not* less than thirty days' notice of the application of such probate to be published once in each of three successive weeks in some newspaper of general circulation in said District, and may order such other publication as the case may require, and shall cause a copy of such application to be mailed to the last known postoffice address of each of the parties so returned not to be found.
>
> "In all cases where it is made to appear to the satisfaction of the court that all or any of the next of kin or heirs at law of the deceased are unknown, such unknown next of kin or heirs at law may be proceeded against and described in the publication of notice hereinbefore provided for as

'the unknown next of kin,' or 'the unknown heirs at law,' as the case may be, of the deceased, and by such publication of such notice under such designation such unknown next of kin and heirs at law shall be as effectually bound and concluded as if known and their names were specifically set forth in said order of publication."

* * * * * * *

Section 140 is as follows:

"SECTION 140. *Trial of issues as to wills.*—Whenever any caveat shall be filed issues shall be framed under the direction of the court for trial by jury: *Provided*, That in all cases in which all persons are interested are *sui juris* and before the court the issues may be tried and determined by the court, without a jury, upon the written consent of all such parties. If they are to be tried by a jury they shall be triable in said probate court; and at least ten days prior to the time of trial all of the heirs at law or next of kin of the decedent, or both together, as the case may require, and all persons claiming under the will shall be each served with a copy of said issues and a notification of the time and place of the trial thereof. If any one of them be an infant or of unsound mind he shall have a guardian *ad litem* appointed for him by the court before such trial shall proceed. If, as to any party in interest, the notification shall be returned 'Not to be found,' the court shall assign a new day for such trial, and shall order publication, at least twice a week for a period of not less than four weeks, of *the substance of the issues and of the date fixed for the*

trial thereof in some newspaper of general circulation in the District, and may order such further publication as the case may require. And the Supreme Court of the District of Columbia may from time to time prescribe and revise rules and regulations for service personally upon such party outside of the District of Columbia of a copy of such issues and notification. Personal service on absent parties shall not be essential to the jurisdiction of the court. * * * in all cases in which such issues shall be tried the verdict of the jury and the judgment of the court thereupon shall, subject to proceedings in error and to such revision as the common law provides, be *res judicata as to all persons; nor shall the validity of such judgment be impeached or examined collaterally.*"

* * * * * * *

That the probate court is a court of limited and statutory jurisdiction only we assume is beyond question. It has been so decided in this jurisdiction.

Dugan *vs.* Northcutt, 7 App. D. C., 351.
Cook *vs.* Speare, 13 App. D. C., 447.
Richardson *vs.* Daggett, 24 App. D. C., 440.

And where jurisdiction is conferred upon a court by statute, the requirements of the statute must be strictly complied with.

In Shelby *vs.* Bacon, 10 How., 64, this court, speaking through Mr. Justice McLean, at page 69, said:

> "This is a proceeding under a statute, and to bring the case within the statute, every material requirement of the act must be complied with.

> And if the above requisites have not been observed, it is not perceived how the court could take jurisdiction of the case."

And if a court of statutory jurisdiction exceeds its authority or powers, by not proceeding in the manner prescribed, its proceedings are void and not merely voidable.

Sigourney *vs.* Sibley, 21 Pick., 101.
Hendrick *vs.* Cleveland, 2 Vt., 329.
Barrett *vs.* Crane, 16 Vt., 246.

> "Courts of probate are created by statute, and possess special and limited jurisdiction only. The record of their proceedings must show their jurisdiction. Nothing is to be presumed in favor of the right to divest an heir of his title. The authority to do so is derived wholly from the statute, and its provisions must be strictly complied with."
>
> Tracy *vs.* Roberts, 88 Me., 310.
> Clarke *vs.* Perry, 5 Cal., 58.
> People's Sav. Bk. *vs.* Wilcox, 15 R. I., 258.
> Smith *vs.* Howard, 86 Me., 203.
> Root *vs.* McFerrin, 37 Miss., 17.

It no doubt will be at once suggested by the other side that plaintiff in error is estopped from raising the question of jurisdiction at this late day; that he had his day in court and thereby waived any want of jurisdiction; and that the issues were framed by the court on his application, etc. This, we submit, can not, in any possible manner, affect the question of jurisdiction. It is too well settled law, we submit, to require citation of authority, that if the court had no jurisdiction of the

subject-matter, that objection is not waived by appearing to the action. For here the rule applies that "Consent can not confer jurisdiction."

Black on Judgments, vol. 1, 2d ed., secs. 222, 225.

Works on Jurisdiction, 118.

Zecharie *vs.* Bowers, 40 Am. Dec., 111.

> "It is only when a judge or court has no jurisdiction of the subject-matter of the proceeding or action in which an order is made or a judgment rendered, that such an order is wholly void, and that the maxim applies that consent can not give jurisdiction. In all other cases the objection to the exercise of the jurisdiction may be waived, and is waived when not taken at the time the exercise of the jurisdiction is first claimed."
>
> Black on Judgments, vol. 1, 2d ed., sec. 217.

We, of course, admit that if this were an action *in personam*, or even an action *in rem*, in which we were interested in the fund in litigation, by appearing and defending we would be bound and precluded from raising any question as to jurisdiction. BUT THIS IS A PROCEEDING IN THE NATURE OF AN ACTION IN REM, TO DETERMINE THE VALIDITY OF THE WILL OF A DECEASED PERSON (THE MENTAL STATUS OF THE DECEASED), NOT WHETHER THE WILL IS VALID AS TO PLAINTIFF IN ERROR, BUT AS TO THE WHOLE WORLD, AND TO DETERMINE THE TITLE TO THE REAL AND PERSONAL ESTATE OWNED BY THE DECEASED.

Under the old law (act of Maryland of 1798) this court held that to give the Orphans' Court jurisdiction to

determine the validity of a will it was not essential that all parties in interest should be before the court. If any interested party should appear and caveat the will, and issues should be framed and tried by a jury, a judgment must be entered upon the verdict, and all parties in interest and strangers were absolutely bound thereby.

Dugan *vs.* Northcutt, 7 App. D. C., 351.

The effect of that decision actually precluded the decedent's only heir at law (her son), who had been disinherited by the alleged will, and who had absolutely no notice of the death of his mother, or of the proceedings to probate the alleged will, until after issues had been framed and abandonment by the caveators (parties who had no interest) and a verdict rendered by the jury sustaining the will, from having his day in court. The viciousness of the law as it then stood was for the first time made apparent by that decision. It was not vicious because it made final the verdict of the jury upon the question of the validity of the will, but solely because there was no requirement in the law at that time to compel the bringing into court of all parties in interest before the court undertook to determine whether the alleged will should be admitted to probate or not. It was in the light of that decision and its detrimental effect upon the parties in interest, who were not before the court, and who became absolutely precluded by a verdict had behind their backs by reason of the absence of some proper requirement of the law, that brought about the act of Congress of June 8, 1898, which is identical with the law upon this subject as embodied in the sections of the Code before quoted. In that case it was contended on behalf of Northcutt that the court was without jurisdiction to determine the validity of the alleged will of his mother because there had not been proper publication against him; and that section 8 of subchap-

ter 2, of chapter 101, of the Maryland act of 1798, required publication in some newspaper of general circulation; and publication in the Washington Law Reporter was not a "public paper" in the sense in which the words were used in that statute. The court in reply to that contention, speaking through Mr. Justice Morris at page 369, says:

> "No notice of the application for the probate of a will is required by the testamentary law; but there is a provision for such notice in the rules of the Supreme Court of the District of Columbia for the Orphans' Court, by way of personal service of citation to the next of kin resident in the District, and, when any of such next of kin are non-residents, by publication in one or more newspapers printed or published in the city of Washington for such time and in such manner as the court may direct. The court in the present instance designated the Washington Law Reporter as the newspaper in which the notice should be inserted. We fail to see how this action can be regarded as implying a failure of jurisdiction on the part of the court to proceed, *as seems to have been subsequently assumed.* While publication was proper and the best possible publication should be secured, *we know of no provision of law that makes the jurisdiction of the Orphans' Court depend upon notice to next of kin.* And even if jurisdiction did depend upon it, that jurisdiction attached when any of the persons intended to be notified voluntarily came in and became actors in the proceedings, as occurred in the present case."

After first stopping and taking time to absorb the above principles enumerated by the Court of Appeals in the Northcutt case, if we then proceed to read and analyze the sections of the code in question it becomes perfectly apparent that an actual compliance with such sections is an essential prerequisite to the jurisdiction of the Probate Court.

When Congress passed the act of June 8, 1898, which was afterwards embodied in the sections of the Code hereinbefore referred to, it realized that to determine the validity of a will that passed title to real estate as well as personal property belonging to a deceased person, it should be done in such a way that every one interested would be before the court. This we submit becomes plain when we analyze the act.

Section 130 says:

> "Upon the filing of a petition for probate of a will citation shall issue to *all* persons who would be entitled to or interested in the estate * * * But if *any* of the parties * * * aforesaid * * * should be returned 'not to be found' the said court shall cause not less than thirty days' notice of the application * * * to be published * * * and shall cause a copy of such publication to be mailed to the last known post-office address *of each of the parties so returned not to be found.*"

Could it be said in the face of this section that jurisdiction would attach if any one, of two or more persons interested, who had been returned "not to be found," should voluntarily appear and take part in the proceedings and no publication were had against the others?

If so, then section 131 of the Code, which makes it prerequisite to the taking of proof of the will, "that due proof of such publication and mailing being made," is absolutely meaningless. The mailing prescribed by section 130 is, "shall cause a copy of such publication to be mailed to the last known postoffice address of *each of the parties so returned.*"

It may be suggested that the above may all be true, but no portions of the sections we have quoted have anything to do with the publication prescribed for in cases where it is made to appear that the "next of kin or heirs at law" are unknown. If such a suggestion is made, we respectfully submit the principle is identically the same in either case. The reason for the publication is the same, namely, to get the parties, *and all the parties*, in interest before the court *before the status of the decedent is settled.* The mode prescribed, of course, is different for those who are known, from that prescribed for the heirs and next of kin who are unknown.

When we look at section 140 it becomes doubly obvious that the court is without jurisdiction to proceed to take proof until it has complied with section 130. That section, after providing that a notice of time of trial and a copy of issues shall be served, and if as to any of the parties return is made "not to be found," that publication of issues shall be made, etc., but, "*personal service on absent parties shall not be essential to the jurisdiction of the court.*" *Non constat*, service by publication must be had if no personal service was had in the first place. Why? BECAUSE IN ALL CASES "IN WHICH SUCH ISSUES SHALL BE TRIED THE VERDICT OF THE JURY AND THE JUDGMENT OF THE COURT THEREUPON SHALL, SUBJECT TO PROCEEDINGS IN ERROR AND TO SUCH REVISION

AS THE COMMON LAW PROVIDES, BE *RES JUDICATA* AS TO ALL PERSONS."

It no doubt will be urged by the other side that the proceeding, without first complying with the statute, was a mere irregularity which plaintiff in error can not take advantage of, and that the subsequent publication against the unknown heirs and next of kin has cured any defect. That no one has appeared in response to the publication and in consequence the judgment admitting the alleged will to probate is absolutely final. In reply we submit if our contention be correct, that the sections of the Code above recited are prerequisite to the exercise of jurisdiction, then no subsequent act by the court can rectify the want of jurisdiction at the time it proceeded. It would be an unheard-of proposition that a court of special statutory jurisdiction could pass an order *nunc pro tunc* that would give it jurisdiction.

In Winslow *vs.* Troy, 97 Me., 130, it was held that the judgment of a probate court was a nullity as the record did not show that a proper notice by publication had been given, although the party was present in court with full knowledge thereof and consenting thereto. The court said that the fact of being present did not obviate the difficulty and that the judge of probate could act only when the notice had been given as required by statute.

In a case involving a Kentucky statute which gives an heir, under like conditions, three years in which to impeach the decision and a right to have a retrial of the question of probate after the finding of a jury, the court in Bohannon *vs.* Tarbin, 76 S. W., on page 48, said:

> "To guard against the hardship and confusion incident to nullifying the whole judgment because some of the beneficiaries were not served

with process, and yet to give those absent beneficiaries their day in court, the statute was passed."

Where want of jurisdiction is of the subject-matter of the action, the objection can not be waived, and may be raised for the first time on appeal. It is also the rule that this objection may be raised at any stage during the trial. The rule is founded upon very simple and adequate reasons, since a judgment rendered by a court having no jurisdiction of the subject-matter would be a mere form, and simply null, wherever and whenever called in question in a court of law.

8 Enc. Pl. & Pr., 173.

In conclusion, we respectfully submit the decree of April 15, 1908, admitting the alleged will to probate should be reversed and the cause remanded to the court below with instructions to vacate the order of July 31, 1907, and all the proceedings subsequent thereto.

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J. M. CHAMBERLIN.
Attorneys for Plaintiff in Error.

(21,501.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 142.

DAVID W. LEWIS, *Plaintiff in Error,*

vs.

L. FLEET LUCKETT AND MARGARET ESTELLE JONES.

BRIEF AND ARGUMENT OF COUNSEL FOR DEFENDANTS IN ERROR.

The facts are concisely and sufficiently stated in the opinion of the Court of Appeals (Rec., 19, 20).

The plaintiff in error contends that the Probate Court of the District of Columbia is a court of limited statutory jurisdiction and is without jurisdiction to try, or even to frame, issues raised by a caveat to a will, without first giv-

ing notice by publication to unknown heirs at law and next of kin, notwithstanding the fact, as in this case, that it affirmatively appears of record, and is uncontradicted, that no such unknown heirs at law or next of kin exist and that all parties interested in the estate of the decedent are before the court upon personal service of process or voluntary appearance. This contention is erroneous.

I.

The said Probate Court had general jurisdiction of the subject matter in this cause.

In re Dahlgren, 30 App. D. C., 588, 596.

The Supreme Court of the District of Columbia is a court of general jurisdiction. "All causes in said court shall be heard and determined in special term, and the several terms are declared to be terms of the Supreme Court, and the judgments, decrees, sentences, orders, proceedings, and acts of said several terms shall be deemed judgments, decrees, sentences, orders, proceedings and acts of the Supreme Court." (Code D. C., Sec. 66.) The said Probate Court is one of said special terms (*Id.*, Secs. 63, 64).

"The special term of said Supreme Court, heretofore known as the Orphans' Court, shall be designated the Probate Court, and the justice holding said court shall have and exercise all the powers and jurisdiction by law held and exercised by the Orphans' Court of Washington County, District of Columbia, prior to the twenty-first day of June, Anno Domini eighteen hundred and seventy." (Code D. C., Sec. 116.) "That in addition to the jurisdiction conferred in the preceding section, plenary jurisdiction is hereby given to the said court holding the said special term to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within

the District of Columbia, and of any and all wills and testaments properly presented for probate therein, and to admit the same to probate and record in said special term; and neither the execution nor the validity of any such will or testament so admitted to probate and record shall be impeached or examined collaterally, but the same shall be in all respects and as to all persons, *res judicata*, subject, nevertheless, to the provisions hereinafter contained." (Code D. C., Sec., 117.) The said court "shall have full power and authority to take the proof of wills of either personal or real estate and admit the same to probate and record. and for cause to revoke the probate thereof." (*Id.*, Sec., 119.)

"Plenary jurisdiction" means full, entire, complete, absolute, unabridged, jurisdiction.

Webster Dict.; 31 Cyc., 890; Black, L. Dict.

II.

The said Probate Court at each step in the proceedings had full and complete jurisdiction of the person as to every person interested in the subject matter of this cause.

The provisions of the Code D. C., bearing on this proposition are as follows:

Sec. 130 provides in effect that upon the filing of a petition for probate of a will, citation shall issue to all persons interested and if it be served upon all of them and no caveat be filed the court may proceed without publication. But if the citation be returned, as to any of the persons interested, "not to be found," notice by publication to those persons must be given. This provision does not apply to this case, because no person interested was returned "not to be found" and all persons interested were before the court.

That section (130) was amended by adding further provisions *permitting* notice by publication to unknown heirs and next of kin in order to bind and conclude them by the proceedings. The giving of such notice is not required in any case, but is merely optional, and by Section 137, after the admission of a will to probate, a further time is allowed all persons interested within which they may file a caveat, including those actually served with process or actually appearing as well as minors and persons who were proceeded against by publication.

Section 136 provides that upon the filing of a caveat impeaching the validity of a will, the will "shall not be admitted to probate until the issues raised by said caveat shall be determined, as hereinafter directed."

Section 139 provides that "if either party require it, the Court shall direct an issue to be made up to be tried by a jury."

Section 140 relates only to the framing and trial of issues raised by caveats. It provides "That in all cases in which all persons interested are *sui juris* and before the court the issues may be tried and determined by the court, without a jury, upon the written consent of all such parties. If they are to be tried by a jury they shall be triable in said Probate Court"; that a copy of the issues and notice of time and place of trial shall be served upon the heirs at law and next of kin and all persons claiming under the will; that "if, as to any party in interest, the notification shall be returned 'not to be found,' the court shall assign a new day for such trial, and shall order publication" of the substance of the issues and of the date fixed for the trial thereof.

Therefore, and upon the whole record, it appears:

1. That notice by publication or otherwise to unknown heirs at law or next of kin is not required by the statute,

but is permitted as a precautionary measure under Sec. 130 of the Code.

2. That notice by publication is not required by the statute except where process, under Sec. 130 or Sec. 140 of the Code, to some known party or parties in interest has been returned "not to be found," and in this case no such notice by publication was required because no such return was made.

3. That the testatrix left no heirs at law or next of kin other than the plaintiff in error, Lewis. This fact is expressly averred in the petition for probate of the will (Rec., 1), and in the petition of Miss Jones (Rec., 6), and is not denied in the caveat of Lewis (Rec., 2, 3), or elsewhere.

III.

The record discloses affirmatively that there are no heirs or next of kin, known or unknown, and no person having any interest in the issues tried other than those who participated in the trial, where the defendants in error were plaintiffs and the plaintiff in error, the caveator, was defendant (Rec., 7).

At that trial all the issues raised by the caveat were determined against the caveator, now plaintiff in error, by the verdict against him and he is now bound thereby. He does not allege any error at that trial nor does he suggest any new issue to be tried.

The final decree (Rec., 13, 14) was expressly based, not only upon the verdict, but also upon due proof of publication and proof by the attesting witnesses of the due execution of the will and upon "all and singular the proceedings herein had," to all which proceedings the plaintiff in error was a party.

The mere fact that, subsequent to the verdict upon the

issues raised by the caveat, notice by publication was given to unknown heirs at law and next of kin (Rec., 8) is no evidence that any such heirs or next of kin existed, nor should their existence be presumed.

Hollingsworth vs. Barbour, 4 Peters, 466, 477.

The judgment should, therefore, be affirmed.

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